

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
WALKER RIVER PAIUTE TRIBE,)
)
Plaintiff-Intervenor,)
vs.)
)
WALKER RIVER IRRIGATION DISTRICT,)
a corporation, et al.,)
)
Defendants.)
_____)
MINERAL COUNTY,)
)
Proposed-Plaintiff-Intervenor,)
vs.)
)
WALKER RIVER IRRIGATION DISTRICT,)
a corporation, et al.,)
)
Proposed Defendants.)
_____)

IN EQUITY NO. C-125-RCJ-WGC
Subproceeding: C-125-C

3:73-CV-00128-RCJ-WGC

**[Proposed] ORDER RELATING
TO COMPLETION OF SERVICE**

On October 25, 1994, Mineral County filed a Notice of Motion and Motion for Intervention and a Petition to Intervene in the C-125-B case. (C-125-B Doc. Nos. 31-32). On January 3, 1995, the Court created subfile C-125-C, or 3:73-CV-128. Minutes of the Court, at 1 (C-125-C Doc. No. 1).¹ On February 9, 1995, the Court ordered Mineral County to file revised Intervention Documents and to serve these Intervention Documents on all claimants to the waters of the Walker River and its tributaries pursuant to Federal Rule of Civil Procedure 4. Order

¹ Unless otherwise noted, all document references are to C-125-C documents.

1 Requiring Service of and Establishing Briefing Schedule Regarding the Motion to Intervene of
2 Mineral County, ¶¶ 2, 3 (Doc. No. 19). Mineral County filed its Amended Complaint in
3 Intervention, (Doc. No. 20), Amended Memorandum of Points and Authorities in Support of
4 Mineral County's Amended Complaint in Intervention, (Doc. No. 21), and Motion for
5 Preliminary Injunction; Memorandum of Points and Authorities; Affidavit of Kelvin J.
6 Buchanan; and Affidavit of Gary L. Vinyard, Ph.D. (Doc. No. 22), on March 10, 1995.² On
7 September 29, 1995, the Court clarified the February 9 Order and the set of documents that
8 Mineral County was required to serve on claimants to the waters of the Walker River and its
9 tributaries. Order, at 2 (Doc. No. 48). Over the ensuing years Mineral County completed service
10 on the vast majority of proposed defendants.

12 On August 29, 2008, Mineral County filed a Service Report indicating that service is
13 close to complete and requesting that the Court requesting that the Court confirm the caption
14 submitted by Mineral County, amend certain names in the caption, strike certain names from the
15 caption, and substitute other names in their stead, ratify service efforts for several proposed
16 defendants, and clarify the status of service on several proposed defendants. Mineral County
17 Report Concerning Status of Service on Proposed Defendants (Doc. No. 479). On September 27,
18 2011, Magistrate Judge Leavitt issued an Order Concerning Service Issues in C-125-C (Doc. No.
19 547), which granted the requests made in Mineral County's August 2008 Service Report. WRID
20 filed objections to that Order (Doc. Nos. 552 & 553), Mineral County responded (Doc. No. 563),
21 and the Court overruled those objections in its April 23, 2012 Order with the exception of
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26 ²Together, all five of these documents relating to Mineral County's Motion for Intervention will
27 be referred to as Mineral County's "Intervention Documents."
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WRID's objection to the dismissal of Michael Sherlock, who will remain in the caption and must be served pursuant to Fed. R. Civ. P. 4. Order, at 22-27 (Doc. No. 592).³

Mineral County is now ready to move forward with its final service efforts in C-125-C. On June 7, 2012, Mineral County submitted a Report Concerning Status and Completion of Service containing a final service list of proposed defendants to be served pursuant to Rule 4, an updated caption reflecting all orders of the Court to date, and a service package for approval by the Court, which includes Mineral County's Intervention Documents, a Notice in Lieu of Summons, a Notice of Lawsuit and Request for Waiver of Personal Service of Notice in Lieu of Summons, and associated forms listed in paragraph 4 below. The Court finds that the list of 107 proposed defendants that remain to be served, submitted by Mineral County in its June 7, 2012 Report Concerning Status and Completion of Service, based upon previous orders of the Court, represents the final list of defendants to be served pursuant to Rule 4. The Court also finds that the updated caption submitted by Mineral County accurately reflects all orders of the Court to date. The Court further finds that the service package submitted by Mineral County complies with and is consistent with all orders of the Court to date.

THEREFORE, IT IS HEREBY ORDERED as follows:

1. Based on previous orders of the Court, the final list of proposed defendants to be served pursuant to Rule 4 submitted by Mineral County is hereby approved and is attached hereto as Attachment A.

2. The updated caption submitted by Mineral County is hereby approved as accurate and valid because it is consistent with all previous Orders of the Court that added and dismissed parties and is attached hereto as Attachment B.

³ As the Court noted, in its April 23, 2012, Order, Mineral County already had agreed that Michael Sherlock should not be dismissed and will be served.

1 3. The service package submitted by Mineral County is hereby approved.

2 4. On or before March 1, 2013, Mineral County shall make service pursuant to Rule
3 4 of the Federal Rules of Civil Procedure of the following documents on all claimants to the
4 waters of the Walker River who remain to be served:

- 5 a. Notice of Motion and Motion for Intervention (Doc. No. 2);
6
7 b. Proposed Petition to Intervene, Memorandum of Points and Authorities in
8 Support of Proposed Petition to Intervene, and supporting affidavits and
9 exhibits (Doc. No. 3);
10 c. Amended Complaint in Intervention (Doc. No. 20);
11 d. Amended Memorandum of Points and Authorities in Support of Mineral
12 County's Amended Complaint in Intervention (Doc. No. 21);
13 e. Motion for Preliminary Injunction, Memorandum of Points and Authorities,
14 affidavits, Affidavit of Kelvin J. Buchanan, P.E., and Affidavit of Gary L.
15 Vinyard, Ph.D. (Doc. No. 22);
16 f. Notice in Lieu of Summons properly issued by the Clerk of the Court,
17 attached hereto as Attachment C;
18 g. Notice of Appearance and Intent to Participate form, attached hereto as
19 Attachment D;
20 h. Disclaimer of Interest in Water Rights and Notice of Related Information and
21 Documentation Supporting Disclaimer form, attached hereto as Attachment E;
22 i. Joint Motion for Substitution of Parties Following Transfer of Interest form,
23 attached hereto as Attachment F;
24 j. Statement Noting Death form, attached hereto as Attachment G; and
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1 k. A copy of this Order.

2 5. Responses will be governed by the following provisions, which are included in
3 the Notice in Lieu of Summons referenced in paragraph 4 of this Order, and attached hereto as
4 Attachment C:

5 a. Responses to Mineral County's Notice of Motion and Motion for Intervention
6 shall be filed and served pursuant to a schedule to be established by further
7 order of the Court;

8 b. No answer or other response to Mineral County's Proposed Petition to
9 Intervene and Amended Complaint in Intervention will be required until a
10 decision by the Court on Mineral County's Motion for Intervention and then
11 only upon a schedule to be established by further order of the Court;

12 c. No response to Mineral County's Motion for Preliminary Injunction will be
13 required until a decision by the Court on Mineral County's Motion for
14 Intervention and then only upon a schedule to be established by further order
15 of the Court;

16 d. Within thirty (30) days of service of the Notice in Lieu of Summons the
17 proposed defendant served shall file with the Court and serve on counsel for
18 Mineral County, the Walker River Irrigation District, the United States,
19 Walker River Paiute Tribe, Nevada, California, and the United States Board of
20 Water Commissioners at their respective addresses, a Notice of Appearance
21 and Intent to Participate which includes the name of the proposed defendant
22 and the mailing address of that proposed defendant or of its counsel;
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1 e. Persons, corporations, institutions, associations or other entities who, at the
2 time of service, no longer own a water right subject to this litigation must file
3 the Disclaimer of Interest referenced in paragraph 4(h) of this Order with the
4 Court and serve it on Counsel for Mineral County within thirty (30) days of
5 service;

6 f. Persons, corporations, institutions, associations or other entities who waive
7 service or are served and who subsequently sell or otherwise transfer a water
8 right that is the subject of this litigation may file with the Court a Joint Motion
9 for Substitution referenced in paragraph 4(i) of this Order;

10 g. Representatives or heirs to persons who died after being served, and who
11 owned a water right that is the subject of this litigation may file with the Court
12 a Statement Noting Death referenced in paragraph 4(j) of this Order.
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15 6. If Mineral County intends to seek a waiver of service of the above documents,
16 pursuant to the provisions of Fed. R. Civ. P. 4(d), Mineral County shall allow thirty (30) days for
17 return of the waiver of service and shall include with the mailing to persons requested to waive
18 service the documents listed in paragraph 4 of this Order, except for the Notice in Lieu of
19 Summons described in paragraph 4(f) above.

20 In addition to the documents to be mailed, as listed in paragraph 4, the mailing to each
21 such proposed defendant seeking the waiver of service shall also include a Notice of Lawsuit and
22 Request for Waiver of Personal Service of the documents included in the said mailing and for
23 waiver of personal service of summons generally in accordance with Form 5 of the Rules of
24 Civil Procedure, but modified to cover service of the other documents included in the mailing.
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1 The Notice shall substantially conform to the Notice of Lawsuit and Request for Waiver of
2 Personal Service of Notice in Lieu of Summons attached to this Order as Attachment H.

3 In the event that Mineral County intends to seek a waiver of service as set forth above, it
4 also shall include with the documents mailed to a proposed defendant from whom such a waiver
5 is sought a form of waiver generally in accordance with Form 6 of the Rules of Civil Procedure,
6 but modified to cover waiver of service of summons and the other mailed documents as
7 described above. The Waiver shall substantially conform to the Waiver of Personal Service of
8 Notice in Lieu of Summons attached to this Order as Attachment I.
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10 7. At such time as all service required by this Order is complete, Mineral County
11 shall file a statement to that effect.

12 8. Once service has been deemed complete by the Court, the Court will set a
13 schedule for responses to Mineral County's Intervention Documents. At that time, proposed
14 defendants who have entered appearances will receive notice of the schedule for responses.
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16 9. Persons, corporations, institutions, associations or other entities who waive
17 service or are served but who do not appear shall nevertheless be deemed to have notice of
18 subsequent orders of the Court with respect to the Notice of Motion and Motion for Intervention,
19 answers or other responses to the Proposed Petition to Intervene and Amended Complaint in
20 Intervention, or responses to the Motion for Preliminary Injunction.
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22 **10. Treatment of Defendants Who Transferred Their Interest(s) Prior to**
23 **Service:**

24 Pursuant to the Court's September 6, 2011 Amended Order Concerning Service Issues
25 Pertaining to Defendants Who Have Been Served (Doc. No. 542), if any person or entity
26 receiving service by mail or personal service has no interest in any water right subject to
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1 subproceeding C-125-C, that person or entity shall notify the Court and Mineral County in
2 writing of that fact.

3 If such a person or entity sold or otherwise conveyed ownership of *all* water rights
4 subject to Subproceeding C-125-C before being served or otherwise brought into the
5 Subproceeding, in addition to disclaiming any interest in C-125-C, that person or entity shall
6 include a notice providing the same successor-in-interest information required to be included in a
7 Motion for Substitution.
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9 The form and substance of the Disclaimer and Notice shall substantially conform to the
10 form attached to this Order as Attachment E and shall be sent to the Court and counsel for
11 Mineral County.

12 Any person or entity who files a Disclaimer of Interest using the attached form or
13 provides information for this purpose by other means is responsible for the accuracy of that
14 filing. Consequently, any person or entity who files a Disclaimer of Interest of water rights
15 subject to this litigation, but retains such water rights, shall nevertheless be bound by the results
16 of this litigation.
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18 Following its receipt from any person or entity disclaiming any interest in any of the
19 water rights at issue in this case, Mineral County will review the materials received, and, if
20 appropriate, request that the Court dismiss that person or entity from Subproceeding C-125-C.
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22 If Mineral County does not receive a Waiver of Personal Service of Notice in Lieu of
23 Summons and must personally serve a person or entity who subsequently files a Disclaimer of
24 Interest pursuant to this Order, Mineral County will review the materials received, and, if
25 appropriate, request that the Court dismiss the person or entity from Subproceeding C- 125-C,
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1 but that person or entity may be subject to paying the costs related to formal personal service on
2 them.

3 **11. Treatment of Successors-in-Interest As a Result of an *Inter Vivos*⁴ Transfer:**

4 Pursuant to the Court's September 6, 2011 Amended Order Concerning Service Issues
5 Pertaining to Defendants Who Have Been Served (Doc. No. 542), where a defendant has been
6 served in this subproceeding and subsequently sells or otherwise conveys a water right or portion
7 of a water right subject to the subproceeding, the successor(s)-in-interest need not be re-served,
8 but will be bound by the results of this litigation.
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10 Once a defendant has been served in a subproceeding, the burden of keeping track of
11 *inter vivos* transfers of the defendant's water rights in that subproceeding and substituting the
12 defendant's successors-in-interest properly is born by the defendant and its successor(s)-in-
13 interest. The action will continue in the name of the served defendant until such time as the
14 served defendant and any successor(s)-in-interest file an agreement and motion seeking the
15 substitution of the successor(s)-in-interest for the served defendant and the Court approves that
16 substitution.
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18 If a defendant who has been served in a subproceeding subsequently sells or otherwise
19 conveys a water right or a portion of a water right subject to that subproceeding, that defendant
20 and its successor(s)-in-interest may move for substitution pursuant to Fed. R. Civ. P. 25(c).
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22 If the Court approves the substitution of a successor-in-interest for a served defendant in
23 a subproceeding, the action will continue against the successor-in-interest, who will be treated as
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25 ⁴ *Inter vivos* means among the living. Transfers that occur because a served defendant has died are addressed below
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1 a served defendant for the pendency of the subproceeding and shall be bound by the
2 requirements of this Order and all prior and subsequent Orders in that subproceeding.

3 If a defendant who has been served in a subproceeding subsequently acquires additional
4 water rights that are subject to that subproceeding, the prior service on the defendant shall be
5 effective as to all water rights held by that defendant, including any rights acquired subsequent to
6 service.

7
8 The Court has approved the attached form (Attachment F) for use by defendants and their
9 successors-in-interest in subproceedings C-125-C, under the above circumstances. Attachment F
10 sets forth a joint motion by which both the current defendant and its successor(s)-in-interest may
11 identify the rights transferred and indicate their agreement that the successor(s)-in-interest be
12 substituted into the applicable subproceeding for the water rights addressed. This form is not the
13 exclusive means by which successors-in-interest may be substituted into this action.

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15 **12. Treatment of Successors-in-Interest As a Result of a Death:**

16 Pursuant to the Court's September 6, 2011 Amended Order Concerning Service Issues
17 Pertaining to Defendants Who Have Been Served (Doc. No. 542), if a party dies during the
18 course of this litigation, the court may order substitution of the proper party. A motion for
19 substitution may be made by any party or by the decedent's successor or representative. If the
20 motion is not made within ninety (90) days after service of a statement noting the death, the
21 action by or against the decedent must be dismissed." Fed. R. Civ. P. 25(a)(1).

22
23 If no such notice or suggestion of death is made on the record, the case may proceed to
24 judgment with the original named parties. A Statement Noting Death must be filed in all
25 subproceeding(s) of this case in which the decedent was a defendant, and service of the statement
26 must identify the successor(s) to the estate who may be substituted for the decedent.

1 A notice filed in one subproceeding shall not be construed as “service of a statement noting the
2 death” in the other subproceeding for purposes of complying with the Amended Order

3 Concerning Service Issues Pertaining to Defendants Who Have Been Served or FRCP 25(a).

4 Should a death be formally noted on the record by service of a statement noting the death
5 filed in subproceeding C-125-C, Mineral County, or any other party or the decedent’s
6 representative and/or successor(s)-in-interest shall move for substitution of the proper
7 successor(s)-in-interest within ninety (90) days of such notice pursuant to Fed. R. Civ. P. 25(a).

8 The 90-day period may be extended pursuant to Rule 6(b), which provides the Court with the
9 discretion to enlarge this period. Fed. R. Civ. P. 6(b).

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11 The form and substance of the Statement Noting Death shall substantially conform to the
12 form attached to this Order as Attachment G and shall be sent to the Court and served on counsel
13 for Mineral County, the Walker River Irrigation District, the United States, Walker River Paiute
14 Tribe, Nevada, California, and the United States Board of Water Commissioners at their
15 respective addresses.
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17 Absent service of a Statement Noting Death in a subproceeding, the case may proceed
18 against the original named parties in that subproceeding and will bind any and all successor(s)-
19 in-interest.
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1 If a successor-in-interest already is a defendant in either subproceeding as a joint tenant
2 or pursuant to other joint ownership of the right(s) owned by the decedent, no action is required
3 and the subproceeding will continue against the successor-in-interest.

4 DATED: _____, 2012

5
6 _____
7 United States Magistrate Judge

8 Respectfully submitted this 7th day of June, 2012,

9
10 _____
11 /s/ SIMEON M. HERSKOVITS

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